

Commission on Health and Safety and Workers' Compensation

MINUTES OF MEETING December 9, 2005 Elihu M. Harris State Building Oakland, California

In Attendance:

Chair John Wilson

Commissioners Allen Davenport, Kristen Schwenkmeyer, Alfonso Salazar, Robert B. Steinberg,
Darrel "Shorty" Thacker and Angie Wei

Executive Officer Christine Baker

Not in Attendance

Commissioner Leonard C. McLeod.

Call to Order

Chair John Wilson called the meeting to order at 9:07 a.m. Chair Wilson noted that a quorum was not yet present and the Agenda would be reordered to begin with the discussion of Terrorism and California Workers' Compensation Insurance.

Terrorism and California Workers' Compensation Insurance

Robert T. Reville, Ph.D., Research Director, RAND

Michael Nolan, President, California Workers' Compensation Institute (CWCI)

Christine Baker, Executive Officer, CHSWC

Background

Dr. Reville provided a briefing on background on the issue of terrorism and workers' compensation in California. He stated that after September 11th, a large part of the recovery was significant workers' compensation payments to compensate the dead and the seriously injured who were at work and were eligible to receive workers' compensation. The Victims' Compensation Fund paid a good deal to the families of the dead and the seriously injured, but those payments took up to two years; in contrast, workers' compensation payments were available immediately, and up to \$1.8 billion in workers' compensation insurance were paid. Dr. Reville stated that after September 11th, insurance lines other than workers' compensation insurance started to exclude terrorism; although workers' compensation insurers are not allowed to do that, they feared that they would become insolvent with future attacks. Dr. Reville stated that these fears, along with fears by employers that they would not be able to pay costs, led to the Terrorism Reinsurance Act (TRIA), intended to support the insurance market in the event of future terrorist attacks, which was passed in 2002 and scheduled to expire on December 31, 2005.

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Dr. Reville explained how TRIA works. Initially, workers' compensation insurers would be expected to make payments up to \$100 billion. After that, TRIA would make payments. Each insurer would be expected to pay a deductible of 15 percent of direct earned premium. For some large insurers, this would be in the range of a billion dollars or more. The federal government would reimburse 90 percent above the deductible, while expecting the insurer to pay 10 percent. For anything below \$15 billion dollars, the federal government would apply a surcharge to all future insurance policies in order to recoup those losses and not burden tax payers. Dr. Reville stated that a study by RAND that has recently been completed shows that even if there were extraordinary large terrorist attacks, with TRIA, it is unlikely that there would be taxpayer involvement.

Key Issues

Dr. Reville stated that the pick-up rates for coverage of terrorist attacks are lower than other lines of coverage, which may lead Californians to think that they are at lower risk for terrorism attack. He then stated that terrorism experts believe that California has significant risk of terrorism attack as evidenced by terrorist threats in California. Dr. Reville also stated that even with the existence of TRIA, there are a number of important public policy issues. If TRIA were to expire on December 31, 2005, these issues would become even more important. The first question is whether workers' compensation insurance funds are adequately protected, especially the State Compensation Insurance Fund (SCIF), which has limitations in regard to limiting risks. Under TRIA, SCIF would not be threatened because its surplus would be larger than its deductible, but if TRIA did expire, costs of a large attack would be very threatening to SCIF. Also, Dr. Reville stated, domestic attacks are not covered under TRIA, and this is a threatening gap.

Dr. Reville then stated that the risks of and losses due to chemical biological radiological and nuclear (CBRN) attacks are largely unknown, but these types of attacks could lead either to extensive loss of life or long-term health care effects. Dr. Reville stated that the five people who survived the anthrax attacks in 2001 have not been able to return to work due to long-term health problems. In addition, he stated that the effects of chemical and radiological attacks are largely unknown.

Dr. Reville stated that having large concentrations of employees at a particular location has become a key concern. Insurance companies are reluctant to offer insurance to employers with a large number of employees in a particular location. In addition, a large county that is self-insured may not have taken the steps to insure under TRIA. If, for example, that county has a number of hospitals, there would be seriously increased risk in the case of chemical or biological attacks.

Update on TRIA

Dr. Reville stated that the Senate passed a bill two weeks ago extending TRIA for two years, and the House passed a bill this week for a two-year extension of TRIA. Because the bills are different, there is a significant chance that there will not be new legislation. Dr. Reville stated that the House Bill has features that address some gaps in TRIA: for example, for property lines, the House Bill requires CBRN property damage coverage, it extends the coverage to domestic attacks, and it adds group life coverage. These features represent an improvement over TRIA as

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it is currently. However, Dr. Reville stated, the Administration strongly prefers the Senate Bill and that suggests there will be little hope for an additional extension after two years. Dr. Reville concluded that although a Conference Committee has been established to resolve differences between the two bills next week, this is just for another two-year extension and there is still no long term solution. He also stated that workers' compensation is the area most at risk of some type of insurance catastrophe following a terrorist attack,

Dr. Reville noted that CHSWC has been active on this issue over the past year. It participated in a symposium that the University of Southern California (USC) held in June. This was an important symposium, which may have contributed to the support for the renewal of TRIA.

Key Issues to Consider

2006 is the hundredth anniversary of the San Francisco earthquake. RAND and CHSWC have been talking about the possibility of holding a conference on the effects of earthquake on workers' compensation. CHSWC is in a position to work with agencies to address these sorts of issues and to promote continuing dialogue on worker protection in the event of terrorism.

Additional Issues

Michael Nolan, President of the California Workers' Compensation Institute, thanked CHSWC for its interest in terrorism. He referred to TRIA as a wild card in the California workers' compensation system. He stated he would discuss three areas: why a TRIA extension is of concern to risk-takers, including self-insureds; the debate in Congress about this matter; and long-term issues.

Mr. Nolan stated that risk-takers are concerned about the effect of terrorism on the California workers' compensation system because terrorism is unpredictable in terms of frequency and severity and therefore traditional ways cannot be used to predict how to insure that type of risk. Even the new ways of modeling catastrophic events, Mr. Nolan stated, may not be helpful because there is little data and because a lot of the underlying data is in the hands of the government, not the private sector.

Mr. Nolan then stated that the market is not really a free market. If there were a free market, in terms of forms and rates, the carriers would be in a better position to protect themselves. If there is mandated coverage, either in lines like workers' compensation or sub-lines like commercial general liability, for which some states allow you to take exception to terrorism and some states do not, then that issue alone says it is not a free market on this coverage and the rates follow in the same line. In California, for example, you cannot add a terrorist exposure element to pure premium rates; it is an add-on rate and that is because of the philosophy taken by the Department of Insurance. Mr. Nolan stated that self-insurers try to spread out some of their risk by purchasing excess workers' compensation coverage. Providers of excess workers' compensation (the reinsurance market), however, have the same concerns about terrorism as do carriers. He also stated that the reinsurance market is not ready to take on enough of this risk so that primary carriers would feel comfortable carrying the insurance without a TRIA backstop.

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Mr. Nolan stated that the TRIA debate has been going on for the past several years. He stated that the December 31, 2005 date for the TRIA cut-off is a hard date. The two bills differ because in the House Bill, a policy would provide coverage for a year from the date of the policy, while in the Senate Bill, there would be a hard cut-off date two years out of the extension date.

Mr. Nolan stated that another key issue is a dynamic between lines of insurance. He stated that about half of the workers' compensation insurance market in California is insured by multi-state multi-line writers. What happens in their other lines (commercial property or general liability) will affect what happens in the workers' compensation line. He stated that if one line takes the company down, then workers' compensation insurance will go down with it.

Mr. Nolan stated that the word from both the Senate and the House is that the two bills have yet to be reconciled. The Senate claims that there is not enough time left in this year to reconcile the differences, while the House claims that there is enough time.

Mr. Nolan then stated that Dr. Reville focused on a significant difference between the two bills, which is the CBRN issue. This is a critical issue for carriers, and they are not happy with the House Bill on this issue. He also stated that the House Bill has a possible third-year extension (after a two-year extension), which will rely on a public-private Commission being set up to discuss long-term financing of this issue.

Mr. Nolan stated that the insurance industry has tried to work on issues before the TRIA deadline. There have been many meetings since TRIA was passed about long-term coverage, but there are key differences between stakeholders and there has not been consensus on fundamental issues such as: whether domestic terrorism be covered or not; what the deductible should be; what the triggering event should be; which lines should be included (e.g., life, commercial auto, etc.); whether all states should be required to accept the concepts of the TRIA law or whether there should be flexibility for states; what level of control the federal government will exact for providing a backstop; whether the federal government will get into insurance, an ongoing issue which brought in the concept of linking together banking and insurance security systems into potentially unified corporations; and whether insurance should be a state issue or a national issue and controlled at the national level or whether it should at least be a federal-state charter system as there is for banks. Mr. Nolan stated that these issues are why a long-term solution poses difficult.

Mr. Nolan then stated that there are other differences in the insurance community, between large and small insurers, between well-financed and less well-financed insurers, and between aggressive and less-aggressive insurers. This raises the question of whether some insurers in a position of strength would want to back stop those that are not in a strong position. Mr. Nolan stated that financial markets have a different way of looking at how to spread risk than the insurance market. The insurance market is still competitive and wants to see how an individual company survives through a TRIA extension or a long-term extension. The financial markets use an index fund approach, which is an industry-spreading approach and which molds the industry into a unified financial system. Mr. Nolan stated that these are two diametrically opposite concepts of how to finance this situation over the long term.

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Questions and Answers

Chair Wilson asked if the insurance industry plans to do anything about the reservation of rights at the end of this month because of the uncertainty about TRIA. Mr. Nolan replied that that concept started back in January and that it depends on the product lines; you underwrite around the risk in part by treating workers' compensation insurance like property insurance and look at risk concentrations and you look at it on a state-by-state area-to-area basis. If you are not doing that as a company, Mr. Nolan stated, your re-insurers will force you to do that. He also stated that in the lines that allowed you to exclude foreign terrorism coverage, like general liability, some states after 9/11 permitted some carriers to exclude foreign terrorism coverage and some carriers had an endorsement or form to put that in. However, some states did not allow that. Mr. Nolan stated that the question will be what will take place on a go-forward basis for forms and rates with the demise of TRIA. Mr. Nolan also stated that even if TRIA is not extended by December 31st, some of it may be done on an individual basis, and the question would be if a new act will be passed in the beginning of the year. Chair Wilson asked whether in the case of a delay by Congress, self-insureds would expect a wave of cancellations as has happened in the past in the excess market. Mr. Nolan replied that the excess market has different dynamics. In some areas, there may be availability and in some areas there may not be availability.

Commissioner Davenport asked where the insurance industry stands on what Congress and the President are doing to make the country safer. Mr. Nolan replied that different insurance companies look at these issues in different ways, as seen in their marketing and their forms. A lot of the TRIA issues are also involved with catastrophe issues. In California, he stated that earthquake is probably a bigger issue than terrorism coverage for insurers, which includes workers' compensation as well as property. Commissioner Davenport asked if it is the case that you can get earthquake coverage but you cannot get terrorism coverage. Mr. Nolan replied that you can get earthquake coverage right now, but the issue is how much back stop there is for earthquake in the re-insurance sector and what it costs to buy that back-stop coverage.

Commissioner Davenport asked if there is a program for earthquake coverage as earthquake is more likely to happen than terrorism. Mr. Nolan replied that there is not. He stated that there is earthquake coverage on the homeowner side and property lines; coverage is also available on commercial lines where there is more experience and where they have modeled it and have put it into underwriting practices. In contrast, Mr. Nolan commented, the current state of the expertise for modeling terrorism events is very limited, as understanding of frequency and severity is limited. Therefore, government intervention may be needed on such issues as: setting up a pool for the funding mechanism, a special claims administration system; funding it tax free (accumulate money, take a deduction when you put it into the pool and the pool accumulates money); and having capacity enough to cover a large terrorism event. Mr. Nolan stated that all of these issues were addressed in the Tillingham Report and that a number of foreign countries have addressed the issue of terrorism and decided that they need government intervention.

Commissioner Davenport expressed his concern about this issue and also asked about the issue of workplace health and safety precautions. Dr. Reville responded that Christine Baker and he had talked about workplace safety issues as a topic for the USC conference this past June but

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made a decision to split the conference into one that focused on insurance issues and one that would focus on safety issues in the future. Dr. Reville stated that there should be a safety conference focusing on terrorism and natural disasters and that RAND would be ready to help with such a conference. One really important issue for dialogue would be safety in terrorist attacks for first responders. A large number of firefighters and police officers were killed in the World Trade Center attack, and there has been a lot of work done about what should be done with equipment and management of the emergency scene. Dr. Reville stated that there should be a public discussion on these matters in California. Mr. Nolan stated that there is a national organization for insurance risk managers called Risk Insurance Management Society, Inc., (RIMS) that focuses on safety in all lines of insurance, including terrorism, and that this topic is on their local and national agendas. The CHSWC Paper on Terrorism suggests that efforts have been made in government agencies and the private sector to address this issue.

Chair Wilson asked about the recommendations in Dr. Reville's presentation. She stated that a conference could be included on CHSWC's agenda. Mr. Nolan stated that the key issues are what constitutes a triggering event (how many dollars of damage) and what the deductible for an individual insurance company is. He also stated that a key issue for workers' compensation is that the terrorist event has to be a certified foreign terrorism event (certified by the federal government). Mr. Nolan then explained that for workers' compensation, an act of war is also required for a federal back stop.

Chair Wilson stated that CHSWC has already given authority for a second conference, but he also stated that this issue should stay on CHSWC's agenda. Ms. Baker stated that staff would work on a conference with RAND which would include these issues and she would present a proposal for an agenda for a conference at the next CHSWC meeting in February. Mr. Nolan stated that he would provide an update on the status TRIA to Ms. Baker.

Chair Wilson asked if there is something that large self-insureds should do to come under TRIA. Dr. Reville stated that the only thing that could be done would be to set up a captive and then the captive could be covered by TRIA. Mr. Nolan stated that it does not apply to large self-insured retention but the excess part would go to the excess carrier and be covered. Chair Wilson stated that there are a number of self-insured excess pools in California. Mr. Nolan stated that any self-insured should think about frequency and severity and consider what the exposure is and what the needs for excess insurance are. If the back stops remain good, then there is no greater exposure than for any other event. If the back stops fail because they do not have a TRIA back stop, then you have a risk. Chair Wilson asked if the amount that is pooled would be covered. Mr. Nolan replied that it would depend on what product.

Dr. Reville also stated that he and Ms. Baker discussed an additional issue, the possibility that CHSWC could convene a dialogue on the risk of bird flu among poultry workers in California, which would be a significant area for catastrophe.

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Draft CHSWC Background Paper: The Impact of Terrorism on California Workers' Compensation

Christine Baker, Executive Officer, CHSWC

Irina Nemirovsky, Research Program Specialist II, CHSWC

Ms. Baker stated that much of the work on the background paper involved working closely with both Dr. Reville and Mr. Nolan. The CHSWC paper covers background information, the CHSWC/RAND USC Conference, and health and safety efforts for terrorism at the federal and state levels. Ms. Baker stated that one of the recommendations in the paper is to form a Task Force in California that comes together with the agencies; at this time, it was not possible to find such a Task Force existing in California.

Ms. Baker stated that the report is ready to be circulated to the public for feedback. Commissioner Salazar stated that the report was very thorough and that the USC conference was a very valuable forum. Chair Wilson asked that the audience become informed on these matters.

CHSWC Vote

Commissioner Salazar moved to approve that CHSWC circulate for public comment the CHSWC Background Paper on The Impact of Terrorism on California Workers' Compensation, and Commissioner Thacker seconded. The motion passed unanimously.

Minutes from the October 6, 2005 Meeting

Chair Wilson noted that a quorum was present, and he asked for a vote on the Minutes of the October 6, 2005 meeting.

CHSWC Vote

Commissioner Davenport moved to approve the Minutes of the October 6, 2005 meeting, and Commissioner Thacker seconded. The motion passed unanimously.

Background on the Permanent Disability Study

Robert T. Reville, Ph.D., Research Director, RAND

Background

Dr. Reville stated that he would review the work done on permanent disability over the past few years. He stated that CHSWC is in the forefront in the nation as an organization doing research and policy to improve the way that policy for workers' compensation permanent partial disability is done in the United States. CHSWC's research has focused on the economic consequences of a disabling workplace injury, the adequacy of benefits, the success of return to work in California, and how return to work in California compares to other states. A study that was completed last year focused on how the California Permanent Disability Rating Schedule works.

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Dr. Reville stated that the objective was to understand what happens to injured workers over the years after their injury and to measure the disability that is received by the injured workers in such a way as to evaluate how well the workers' compensation system provides different levels of compensation to workers with different types of injuries. One measure of the disability received by the injured worker is to assess how workers' compensation compensates for earnings or wage loss, both in situations where there is return to work and where there is no return to work. Dr. Reville stated that the studies have used data from the Employment Development Department (EDD), which is collected in quarters from every employer in California. He stated that the ratio of benefits to wage loss is the replacement rate; the amount that is still not compensated is called the uncompensated wage loss; and the fraction of regular wages that has been lost and that is used to compare among workers with different wages before injury is proportional wage loss.

Dr. Reville stated that all of the work was done on data before Senate Bill (SB) 899, and some of the key results have been presented in previous reports to CHSWC. Dr. Reville stated that the first and most important finding was that injured workers with permanent disability had very significant and long-term wage losses amounting to tens of thousands of dollars. California had the highest earnings losses over the years after the injury of the five states examined (California, New Mexico, Washington, Wisconsin and Oregon). Proportional wage losses were also estimated to control for the fact that California has higher earnings than the other states. For example, injured workers in Washington prior to their injury were making more than California workers; after their injury, they lost less in earnings than injured workers in California. Also, Dr. Reville stated, prior to SB 899, California was paying more benefits than the other four states. That implies that California's replacement rate was in the middle of the five states examined. Dr. Reville stated that all five of the states had adequate benefits, where adequacy was defined by a 2/3 standard that has been used for many years in other studies. This is the amount calculated for permanent partial disability. The replacement rate over ten years in California was less than 40 percent of the 2/3 standard.

Dr. Reville also stated that California had the highest fraction of disputed claims by a large margin, as well as the highest fraction of lost-time claims receiving permanent partial disability. This is relevant to the rating system which determines eligibility. Dr. Reville stated that the most recent published study also looked at whether the system provided equitable benefits and whether similar benefits were applied to workers with similar injuries and outcomes after their injuries. For four different types of injuries examined, it was found that some injuries, e.g., shoulder injuries, were compensated differently, that is, significantly worse than other types of injuries, having far greater earnings losses than other injuries and yet receiving the same benefits than these other injuries.

Dr. Reville stated that California passed SB 899 and in part due to the work of CHSWC, SB 899 has transformed permanent disability in California. The issues that have changed include that: the AMA Guides are being used for injury descriptions; California designed an adjustment intended to compensate for the loss of earnings capacity; a return-to-work or bump up/bump down incentive providing higher benefits is being offered to the workers who did not receive an offer of return to work at the at-injury employer; and increased benefits are being provided for

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high-rated claims and lower benefits for low-rated claims. Dr. Reville stated that to evaluate the effect of the changes, CHSWC has funded a new study, which RAND will be conducting, to examine return to work in California. Dr. Reville stated that one of the reasons to monitor return-to-work rate is that maintaining or improving adequacy of benefits will clearly require improved return to work given the reduction of benefits. Dr. Reville stated that the data collected will be on claims that follow the implementation of SB 899. Preliminary results of the study are expected in 2007 and final results in 2008.

Commissioner Steinberg asked Dr. Reville if RAND was doing work on future earnings capacity. Dr. Reville replied that RAND was not doing that work, but that RAND had been asked to complete work to help assist the Division of Workers' Compensation (DWC) put into place data systems to implement a five-year revision of future earnings capacity.

Commissioner Wei asked Dr. Reville if he believes that the data collection systems RAND is putting together for the DWC for a five-year revision would have been adequate, if they were completed, to help the DWC complete its mandated 18-month review of the current Permanent Disability Rating Schedule. Dr. Reville responded that since the data for earnings are delayed 9 months, the data post-SB 899 would probably not be sufficiently well-developed for an 18-month analysis.

Commissioner Wei then asked if the apportionment issue was part of the study of changes of SB 899. Dr. Reville replied that they have not done any analysis of apportionment though it is an important issue. Commissioner Wei stated that from what they hear, this issue is becoming more and more important for labor members.

Commissioner Wei also stated that tremendous wage loss can be expected under the new permanent disability rating system. She asked if the goal of the RAND study is to come up with strategies to maximize the replacement of lost wages and if so, what an example of those recommendations may be. Dr. Reville replied that RAND had not necessarily anticipated including the development of strategies as part of the proposal, but instead has positioned the study as a monitoring or data-reporting exercise to determine whether return to work has improved as it was supposed to under SB 899 and whether it has improved enough to overcome the decline in benefits that seems to have emerged. He further stated that the proposal did not address whether the recommendations that would follow from that would involve benefits or return-to-work measures.

Commissioner Wei asked if RAND would be doing an analysis of return-to-work outcomes post-SB 899 and looking at, for example, the effect of the bump up/bump down incentive. Dr. Reville replied that they would be looking at the effect of the bump up/bump down incentive, but they would also be looking at how workers are doing over the one to two years after their injury and how that translates into return to work at the at-injury employer, into the wages they would be receiving at that point, and into the total amount of wages and benefits they are receiving. Commissioner Wei stated that they would look forward to the study.

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Dr. Reville stated that the 2500 cases in the study would be a good number to give a representative outlook. They would essentially be looking at the period 18 months after injury. The data would come from the Employee Development Department.

Ms. Baker stated that right now, CHSWC staff is using the data on wage loss created from RAND's most recent study. Dr. Reville stated that they could start getting realistic data about proportional wage losses earlier than three years and data about return to work at the at-injury employer and how that compares to the pre-SB 899 period. In 2007 and certainly by 2008, it would be possible to have a very clear sense of outcomes.

Update on the Permanent Disability Study

Lachlan Taylor, CHSWC Staff Judge

Frank Neuhauser, UC Berkeley

Mr. Neuhauser stated that he would provide background on the data used in the Permanent Disability Study. The Permanent Disability Rating Schedule went into effect for injuries evaluated for permanent disability after January 1, 2005. The age of those cases, or the time between the injury and the rating, was similar to the age of the cases that come into the Disability Evaluation Unit (DEU). Many of the cases are two, three and four years post-injury. A lot of cases can be used for the type of analysis done by Dr. Reville, which focuses on injuries after three years. He stated that cases and wage loss data would be available and reported to CHSWC in the next few weeks.

Mr. Neuhauser stated that they have about 3,500 cases to be rated for permanent disability and expect to get about 2,500 to 4,000 more that would go through the middle of December. This would create a data sample of 6,000 to 8,000 cases. He stated that there has been no change since the middle of October on average rating and average payment. At that time, the average rating was down about 40 percent lower than the previous rating schedule. Both summary ratings for unrepresented workers and consult ratings for represented workers show about a 40 percent decline in rating and a 50 percent decline in benefits. He stated that they are fairly confident that these estimates are a fair representation of the impact of the new schedule.

Mr. Neuhauser stated that there have been a steady 11 percent of cases subject to apportionment and a little over 40 percent of those have been apportioned to non-industrial causation. About 5-6 percent of total disability payments that would have been paid are therefore being excluded through apportionment. Mr. Neuhauser stated that this is an area where that would be monitored for changes.

Mr. Neuhauser then stated that there is no evidence to determine the percentage of cases getting rated zero. It would require a wait of another 12 months to get the insurance data that would help determine that number.

Judge Taylor stated that CHSWC received a request from the Legislature to determine how the Permanent Disability Rating Schedule might be revised using empirical data. Since the prior

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CHSWC meeting, here has been new data to help with that determination and CHSWC staff has been working on a methodology that could be used based on use of the AMA *Guides* and the requirement to consider diminished future earning capacity established in the RAND schedule. Judge Taylor then stated that one of the suggestions CHSWC received is that it is not necessary to use the pre-2005 ratings as a method to revise the Schedule. One can directly compare the percentage of earnings loss to proportional earnings loss for the average AMA impairment for every type of injury. Judge Taylor stated that there also have been misgivings about using DEU data obtained during the first year. He stated that although as Mr. Neuhauser pointed out, the ratings appear to be stable, there is still reason to be uncertain about how the data will behave. To address these concerns, there should be review and revision of the data every two years to see if the data have shifted.

Judge Taylor stated that there is controversy over what the overall level of ratings should be. CHSWC staff has proposed a technical tool to calculate a Permanent Disability Rating Schedule that achieves the same replacement rate, or the same ratio of earnings to proportional earnings loss, as found in the RAND data for each type of injury, by the average AMA impairment for each type of injury as observed in the DEU ratings. Judge Taylor stated that determining what the replacement rate should actually be is a political decision that CHSWC staff recommendation can not address. Since average earnings loss changes over time, it will be necessary to replace the existing RAND study; however, until changes in the ratings are evident, the existing RAND study is still the best data available.

Judge Taylor stated that part of the current CHSWC recommendation is a separate method for rating psychiatric injuries. He stated that this analysis relies on early data from the DEU. A broad cross-section of injuries is seen in this data. Pre-2005 injuries are ratable under the new schedule; the cross-section of injuries represents a broader cross-section of injuries. Adjustment can be made for any known difference in the age of the case. Judge Taylor then stated that ratings will change for a number of reasons, so that any revision of the schedule should be temporary and always subject to further review as we see how the average ratings and earnings losses evolve.

Commissioner Wei asked if data from the DEU is being received in a timely fashion. Mr. Neuhauser responded that they have not yet received November data but are expecting to receive it in the next few days. Judge Taylor stated that the number of cases received each month is increasing exponentially. Commissioner Wei asked if it is the case that on average, the ratings have decreased by 40 percent and the dollar amount of benefits received by injured workers has decreased by 50 percent. Mr. Neuhauser replied that that is correct.

Commissioner Steinberg asked about coordination of study efforts. Ms. Baker replied that there are two separate contracts and CHSWC fully supports the concepts of trying to integrate the two contracts. She stated that she has sent an email to the Administrative Director of the DWC to discuss merging the two efforts but has not yet received a response. She stated that she will be extending an invitation to the Administrative Director to attend the next CHSWC meeting. Ms. Baker also stated that data from the DEU for November was requested a while ago and notice was received that it would not be forthcoming until another project separate from this one

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is completed. Data requested on apportionment cases has also not been received. Ms. Baker stated that if this pattern continues, it would cause a delay in some of CHSWC's project results.

Dr. Reville stated that RAND has argued in its study that permanent disability cases in California and elsewhere in the country were being determined arbitrarily without reference to any way to compare the outcomes for workers with different injuries. He stated that RAND has argued that a system using empirical data that actually evaluates or estimates the differences between different injuries would be a better system. Dr. Reville then stated that RAND has realized that the data it has produced could be more readily applied to the previous system and that additional work needed to be done to be able to create a crosswalk for the new system. RAND had recommended that the data needed to be collected and made available.

Commissioner Steinberg asked about cases that do not get rated. Mr. Neuhauser replied that there are cases that are rated zero, but most cases that get zero rating are not coming through the DEU because they do not have a ratable impairment. The range of estimates of those cases is 10 to 30 percent; most people think that the 30 percent estimate by Dr. Chris Brigham is more reliable as it represents a representative set of cases. The 10 percent figure came from the California Applicants Attorneys Association and is based on more complex cases. He stated that he would support the 30 percent estimate.

Ms. Baker stated that the data by RAND has only been recently available. She believed that former Administrative Director Andrea Hoch made the best decision she could with the data available at the time. Judge Taylor said that CHSWC's work over the past few months has focused on how to use the RAND wage loss data and the experience under the AMA ratings available from the DEU cases.

Commissioner Wei asked about tying the previous RAND wage loss data to the analysis of the DEU cases. She stated that the statute specifically references the RAND Interim Report of 2003. Judge Taylor commented that the final report of the study given to the DWC which gave the proportional earnings loss for each type of injury. Commissioner Wei stated that the approach is both legally required and methodologically sound because these are cases where there is overlap in when the injuries happened and when the wage loss data were collected. Judge Taylor stated that the severity of injury cases in California has probably not yet changed significantly, though they are likely to change in the future because of cultural change due to improved medical treatment and return-to-work incentives. Ms. Baker stated that CHSWC is working with the Workers' Compensation Insurance Rating Bureau to be sure that the cases coming through the DEU are a fair representation of cases. She then stated that CHSWC is recommending review and revision of the data every two years to correct in case there is any gaming going on.

Commissioner Wei asked if the effort to get the rating schedule back on track and an ongoing review process would incorporate updated data. Judge Taylor responded that it would. Dr. Reville stated that the ideal situation would be to use data on claims after January 1, 2005, and available in 2007 and 2008. That data would be related to medical impairment information. This would provide better data and analysis in the future.

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Mr. Neuhauser stated that there are two issues, the equity between injuries and the level of benefits paid to everybody who is injured. The wage replacement rates have declined because the ratings and payments are lower. Analysis is being done to determine whether equity between injuries has changed. Chair Wilson stated that this was an objective of the new schedule.

Judge Taylor stated that once there is a technically accurate scale that is using the best available empirical data and a public policy that the State agrees on about what the overall level of benefits should be, CHSWC would recommend that the Permanent Disability Rating Schedule be made conclusive evidence of the disability rating, at least for the vast majority of cases. Judge Taylor stated that the purpose of the schedule is to achieve consistency, uniformity and objectivity; if it achieves that, it would not be rebuttable and then there might be a statutory change to accompany the next revision of the schedule. Mr. Nolan stated that under the new permanent disability system, the process was meant to get to a rating that would be more predictable and then you would want to stabilize that rating.

Commissioner Wei stated that she anticipates that CHSWC will adopt a completed study at the next meeting but she is concerned that the data will not be forthcoming enough in time for the next meeting. She asked that the Commissioners be informed if the data is not forthcoming in a timely fashion and informed about what some recommendations would be.

Mr. Neuhauser stated that apportionment was very unusual prior to the passage of the latest legislation. Judge Taylor stated that data need not be limited to the DEU ratings and some workers' compensation files could be used for comparison. He also stated that part of the reason that California's compensation rates were so high was that California compensated for injuries that other states did not compensate.

Ms. Baker stated that the paper presents a methodology for correction and a recommendation for a public policy decision. The paper is ready for peer review and after comments from the peer review were incorporated, it would be ready to be circulated for public comment.

Commissioner Wei asked how many cases out of the 3500 rated so far, how many of them have been above 70 percent. Mr. Neuhauser responded that there are a number above 70 percent, but he would respond to this question more specifically later in email. Mr. Neuhauser also stated that he is preparing an historical database of ratings for the DWC that would allow the DWC to do an analysis.

CHSWC Vote

Commissioner Wei moved to approve that CHSWC circulate for public comment the Draft Permanent Disability Rating Schedule Proposal after it has been peer-reviewed, and Commissioner Thacker seconded. The motion passed unanimously.

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Presentation on the CHSWC Report Card

Christine Baker, Executive Officer, CHSWC

Ms. Baker stated that CHSWC staff have prepared an updated Workers' Compensation Report Card that pulls together in one report the key indicators in the workers' compensation system that are available right now, many of which come from the CHSWC Annual Report. CHSWC began this type of report last year and hopes to keep this information up-to-date and available for interested parties. Ms. Baker stated that this information has been proven to be very useful to the public and that CHSWC is often asked for this type of information by legislative staff as well as by stakeholders.

Chair Wilson asked if the Report has been out to the public, and Ms. Baker responded that it has not. Chair Wilson stated that this is an excellent report and he would urge everyone who receives the report to circulate it.

CHSWC Vote

Commissioner Davenport moved to approve the report, "Selected Indicators in Workers' Compensation: A Report Card for Californians," and Commissioner Schwenkmeyer seconded, and the motion passed unanimously.

Election of CHSWC Chair for 2006

John Wilson, CHSWC Chair

Chair Wilson stated that pursuant to Labor Code Section 75(b), the CHSWC Chair for 2006 must represent labor.

CHSWC Vote

Commissioner Davenport nominated Commissioner Angie Wei, and Commissioner Thacker seconded. The motion passed unanimously.

Chair Wilson stated that it was a pleasure to be Chair of the Commission and work with the staff. He thanked the staff for support during the past year, and he expressed his confidence in the future of CHSWC.

Draft CHSWC Paper on Proof of Workers' Compensation Coverage

Christine Baker, Executive Officer, CHSWC

Ms. Baker stated that this paper was in response to a request by Assembly Member Richman. She introduced new CHSWC staff member Chris Bailey who made a major contribution to the work on this paper. Ms. Baker stated that this paper is an update of a previous issue paper of a few years ago which made specific recommendations to improve workers' compensation

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compliance. She stated that there is no systematic mechanism in place to identify uninsured employers. Although Assembly Bill (AB) 749 provided for an efficient matching records program, it was never implemented due to budget constraints. Ms. Baker also stated that reporting of proof of workers' compensation insurance coverage to the Workers' Compensation Insurance Rating Bureau is sometimes untimely and that it is difficult to identify and match to payroll records due to a lack of a Federal Employer Identification Number (FEIN) number.

Ms. Baker stated that if there could be systematic matching and enforcement, the program could be self-funded. She then stated that in many states, proof of coverage is available to the public. She also stated that the Workers' Compensation Insurance Rating Bureau has indicated that it would make this information available on the Internet if there were a mandate to do so. She stated that some protections might be needed, such as not providing information that would lead to a competitive disadvantage. Ms. Baker then asked CHSWC for approval to make the paper available to the public.

CHSWC Vote

Commissioner Wei moved to approve that the Draft CHSWC Paper on Proof of Workers' Compensation Coverage be circulated for public comment, and Commissioner Thacker seconded. The motion passed unanimously.

CHSWC Co-sponsorship of IAIABC Medical Institute

Christine Baker, Executive Officer, CHSWC

Ms. Baker stated that the International Association of Industrial Accident Boards and Commissions (IAIABC) has asked CHSWC to co-sponsor a conference in March. No CHSWC funds would be expended. She asked CHSWC to give its approval for CHSWC to co-sponsor the IAIABC Medical Institute Conference to be held March 10, 2006, in San Diego.

CHSWC Vote

Commissioner Thacker moved that CHSWC co-sponsor the IAIABC Medical Institute to be held March 10, 2006, in San Diego, and Commissioner Schwenkmeyer seconded. The motion passed unanimously.

Survey of Injured Workers on the Second Opinion for Spinal Surgery

Christine Baker, Executive Officer, CHSWC

Ms. Baker stated that at the previous CHSWC meeting, the CHSWC members expressed interest in conducting the second part of the study on second-opinion spinal surgery, which is a survey of injured workers. This survey would cost approximately \$30,000. Chair Wilson asked if these funds were in the budget, and Ms. Baker responded that they were.

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Ms. Baker asked CHSWC for approval to proceed with the Survey of Injured Workers on the Second Opinion for Spinal Surgery.

CHSWC Vote

Commissioner Thacker moved to approve that CHSWC proceed with the Survey of Injured Workers on the Second Opinion for Spinal Surgery, and Commissioner Salazar seconded. The motion passed unanimously.

CHSWC Request for Proposals (RFP) for the Medical Research Agenda Developed by RAND

Christine Baker, Executive Officer, CHSWC

Ms. Baker stated that in the previous CHSWC meeting, Barbara Wynn from RAND provided background on the medical care agenda and the research that needs to be conducted over the next year to monitor the system. Ms. Baker stated that the staff would like to proceed with the recommendations from that presentation. This would include a study of medical provider networks and treatment protocols and a review of denials from utilization review and a review other factors in how the program is running.

Ms. Baker asked the CHSWC to approve the development of a Request for Proposal (RFP) on the Medical Research Agenda developed by RAND.

CHSWC Vote

Commissioner Davenport moved to authorize the development of the Request for Proposal (RFP) on the Medical Research Agenda developed by RAND, and Commissioner Thacker seconded. The motion passed unanimously.

CHSWC Response to California HealthCare Foundation RFP – Integrating Medical Treatment

Christine Baker, Executive Officer, CHSWC

Ms. Baker stated that CHSWC staff has been working on a proposal to the California HealthCare Foundation to conduct a pilot study on barriers to integrated 24-hour care and to conduct a pilot on a carve-out for janitors. Ms. Baker then stated that the timeframes for the submission of the proposal and this CHSWC meeting did not coincide. She stated that she is therefore requesting that the proposal remain submitted to the California HealthCare Foundation.

Ms. Baker stated that this project involves work with Kaiser SCIF, SEIU Local 1877 and large employers, and that all participants are excited about working on this.

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Commissioner Steinberg stated that he had concerns that this was not within the role of CHSWC. Commissioner Davenport stated that these are valid concerns, but it important to recognize that a negotiated agreement might or might not result from the study. He said that this research study and pilot project would provide value to the negotiating parties if a negotiated agreement is achieved. Commissioner Davenport then stated that he has no economic interest in this project.

Commissioner Wei stated that she appreciates Commissioner Steinberg's concern, but she believes that Ms. Baker laid out the historic role CHSWC has played in both carve-outs and 24-hour care projects. She then stated that as a labor-management commission, this project is exactly what CHSWC wants to be doing. She also stated that she has read the letters of support for this project from labor and management, and she believes that this is a way to bring about proactive steps to develop a better system for employees and employers.

Chair Wilson stated that he would speak on behalf of public large employers who public are also interested in this type of project and in developing carve-outs. He stated that he believes that a pilot is the appropriate way to proceed.

CHSWC Vote

Commissioner Wei moved to approve that CHSWC continue responding to the California HealthCare Foundation RFP by proposing a plan to integrate occupational and non-occupational medical treatment, and Commissioner Thacker seconded. The motion passed 7 to 1, with Commissioner Steinberg casting the opposing vote.

Permanent Disability Rating Schedule Proposal

Christine Baker, Executive Officer, CHSWC

Ms. Baker stated that CHSWC staff would like to proceed to make the Permanent Disability Rating Schedule Proposal available to the public once the study is completed and it has been sent out for peer review.

CHSWC Vote

Commissioner Wei moved to approve that the Permanent Disability Rating Schedule Proposal be made available to the public once the study is completed and it has been sent out for peer review, and Commissioner Thacker seconded. The motion passed unanimously.

Commissioner Wei stated that she would like CHSWC to be prepared to adopt the report after this rigorous review process at the February meeting. Chair Wilson stated that it is important to get the information out to the public.

Ms. Baker then thanked the Chair for being a wonderful guide and inspiration to the staff and presented a Certificate of Appreciation to him. She also thanked the Commissioners for their support and wished everyone a happy holiday season.

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Chair Wilson opened the meeting for public comment.

Public Comment

William Zachry, Chairman of the California Fraud Assessment Commission (FAC), stated that the next FAC meeting will be on December 14th, 9 a.m., at 3434 Tech Center Drive in Sacramento. The primary issue will be aggregate funding for the 2006-07 budget year. Mr. Zachry stated that the budget variance process is going through the state finance process, and it is expected that there will be the necessary funding and approval for expenditure for the research discussed at the previous CHSWC meeting. He then stated that at a previous FAC meeting, there was discussion of a dual-wage classification issue. He stated that he is under the impression that this issue involves an agreement between labor and management about higher-paid union employees. He also stated that there appears to be an incentive process in the dual-wage classification system that creates incentives for employers to improperly or illegally report wages and classifications. He asked that CHSWC look into this issue. In addition, he stated that from a fraud perspective, it is easier to fight fraud when proof of coverage information is readily available.

Adjournment

The meeting was adjourned at 11:40 a.m. The next CHSWC meeting is scheduled for Thursday, February 9th, in Oakland.

Approved:

Angie Wei, Chair

Date

Respectfully submitted:

Christine Baker, Executive Officer

Date